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**UNITED STATES DISTRICT COURT**  
**SOUTHERN DISTRICT OF CALIFORNIA**

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11 ZACHARY L. WEIR,  
12 Inmate No. 12548161

13 Plaintiff,

14 vs.

15  
16 ROBERT M. SZUMOWSKI, Judge; KERRY  
17 WELLS, Judge; CHARLES R. GILL, Judge;  
FREDERIC McGUIRE, Judge; BRENDEN  
McHUGH, Deputy District Attorney;  
EUKETA OLIVER, Public Defender;  
WILLIAM STEARNS; Supervising Public  
Defender; WILLIAM STRALKA, Trial  
Counsel,

18 Defendants.  
19  
20  
21

Civil 13cv1021 GPC (MDD)  
No.

**ORDER:**

**(1) GRANTING MOTION TO  
PROCEED *IN FORMA PAUPERIS*;  
AND**

**(2) DISMISSING ACTION FOR  
SEEKING MONETARY DAMAGES  
AGAINST DEFENDANTS WHO ARE  
IMMUNE AND FOR FAILING TO  
STATE A CLAIM PURSUANT TO 28  
U.S.C. §§ 1915(e)(2)(B) & 1915(a)(1)**

22 On April 16, 2013, Plaintiff, who is committed under the custody of the Department of  
23 Mental Health at Atascadero State Hospital, and proceeding pro se, filed a civil rights Complaint  
24 pursuant to 42 U.S.C. § 1983 in the Northern District of California. (ECF No. 1.) Plaintiff has  
25 also filed a Motion to Proceed *In Forma Pauperis* (“IFP”) pursuant to 28 U.S.C. § 1915(a).  
26 (ECF No. 2.) On April 30, 2013, United States Magistrate Judge Elizabeth Laporte determined  
27 that the majority of Plaintiff’s claims arose in San Diego and therefore, transferred the action to  
28 the Southern District of California. (ECF No. 4.)

1     **I. MOTION TO PROCEED IFP**

2         All parties instituting any civil action, suit or proceeding in a district court of the United  
 3 States, except an application for writ of habeas corpus, must pay a filing fee of \$350. *See* 28  
 4 U.S.C. § 1914(a). An action may proceed despite a party's failure to prepay the entire fee only  
 5 if the party is granted leave to proceed IFP pursuant to 28 U.S.C. § 1915(a). *See Rodriguez v.*  
 6 *Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). Here, The Court finds that Plaintiff has submitted  
 7 an affidavit which complies with 28 U.S.C. § 1915(a)(1) and S.D. CAL. CivLR 3.2. Based upon  
 8 this financial information, the Court **GRANTS** Plaintiff's Motion to Proceed IFP. Because  
 9 Plaintiff is a committee and not a "prisoner" as defined by 28 U.S.C. § 1915(h), the Court will  
 10 waive the initial civil filing fee. *See Page v. Torrey*, 201 F.3d 1136, 1139-40 (9th Cir. 2000).

11     **II. SCREENING PURSUANT TO 28 U.S.C. § 1915(e)(2)**

12         A complaint filed by any person proceeding in forma pauperis is subject to sua sponte  
 13 dismissal to the extent it is "frivolous, malicious, fail[s] to state a claim upon which relief may  
 14 be granted, or seek[s] monetary relief from a defendant immune from such relief." 28 U.S.C.  
 15 § 1915(e)(2)(B); *Calhoun v. Stahl*, 254 F.3d 845, 845 (9th Cir. 2001) (per curiam) (holding that  
 16 "the provisions of 28 U.S.C. § 1915(e)(2)(B) are not limited to prisoners."); *Lopez v. Smith*, 203  
 17 F.3d 1122, 1127 (9th Cir. 2000) (en banc) ("[S]ection 1915(e) not only permits, but requires a  
 18 district court to dismiss an in forma pauperis complaint that fails to state a claim.").

19         "[W]hen determining whether a complaint states a claim, a court must accept as true all  
 20 allegations of material fact and must construe those facts in the light most favorable to the  
 21 plaintiff." *Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000); *see also Barren v. Harrington*,  
 22 152 F.3d 1193, 1194 (9th Cir. 1998) (§ 1915(e)(2) "parallels the language of Federal Rule of  
 23 Civil Procedure 12(b)(6)."'). However, while liberal construction is "particularly important in  
 24 civil rights cases," *Ferdik v. Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992), the Court may not  
 25 "supply essential elements of the claim that were not initially pled." *Ivey v. Board of Regents*  
 26 *of the University of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982). The district court should grant  
 27 leave to amend, however, unless it determines that "the pleading could not possibly be cured by  
 28 the allegation of other facts" and if it appears "at all possible that the plaintiff can correct the

1 defect.” *Lopez*, 203 F.3d at 1130-31.

2 First, to the extent that Plaintiff is seeking money damages based on rulings made by San  
 3 Diego Superior Court Judges, these Defendants are absolutely immune. “Judges and those  
 4 performing judge-like functions are absolutely immune from damage liability for acts performed  
 5 in their official capacities.” *Ashelman v. Pope*, 793 F.2d 1072, 1075 (9th Cir. 1986). Therefore,  
 6 as Superior Court Judges for the State of California, these Defendants have absolute immunity  
 7 from civil proceedings relating to these actions, which were performed within their judicial  
 8 discretion.

9 Second, Plaintiff’s claims for money damages also challenge the validity of his criminal  
 10 conviction. In order to recover damages for an allegedly unconstitutional conviction, Plaintiff  
 11 must show that his criminal conviction has already been invalidated. *Heck v. Humphrey*, 512  
 12 U.S. 477, 486-87 (1994); *Ramirez*, 334 F.3d at 855-56 (“Absent such a showing, ‘[e]ven a  
 13 prisoner who has fully exhausted available state remedies has no cause of action under §  
 14 1983....’”) (quoting *Heck*, 512 U.S. at 489), *cert. denied*, 124 S. Ct. 2388 (2004).

15 *Heck* holds that “in order to recover damages for allegedly unconstitutional conviction  
 16 or imprisonment, or for other harm caused by actions whose unlawfulness would render a  
 17 conviction or sentence invalid, a plaintiff must prove that the conviction or sentence has been  
 18 reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal  
 19 authorized to make such determination, or called into question by a federal court’s issuance of  
 20 a writ of habeas corpus.” *Heck*, 512 U.S. at 486-87. A claim for damages challenging the  
 21 legality of a conviction or sentence that has not been so invalidated is not cognizable. *Id.* at 487;  
 22 *Edwards v. Balisok*, 520 U.S. 641, 643 (1997).

23 In *Heck*, the Supreme Court held that:

24 when a state prisoner seeks damages in a section 1983 suit, the  
 25 district court must consider whether a judgment in favor of the  
 26 plaintiff would necessarily imply the invalidity of his conviction or  
 27 sentence; if it would, the complaint must be dismissed unless the  
 28 plaintiff can demonstrate that the conviction or sentence has already  
 been invalidated. But if the district court determines that the  
 plaintiff’s action, even if successful, will not demonstrate the  
 invalidity of any outstanding criminal judgment against the plaintiff,  
 the action should be allowed to proceed.

1     *Heck*, 512 U.S. at 487 (emphasis added). An action that is barred by *Heck* should be dismissed  
 2 for failure to state a claim without prejudice to Plaintiff's right to file a new action if he succeeds  
 3 in invalidating his conviction. *Edwards*, 520 U.S. at 649.

4         Here, Plaintiff's claims of "false imprisonment" will "necessarily imply the invalidity"  
 5 of his criminal conviction. *Heck*, 512 U.S. at 487. Accordingly, because Plaintiff seeks  
 6 damages for an allegedly unconstitutional criminal conviction and because he has not alleged  
 7 that his conviction has already been invalidated, a claim for damages has not yet accrued. *See*  
 8 *Heck*, 512 U.S. at 489-90.

9         Finally, Plaintiff alleges that the Deputy Public Defenders who represented him in his  
 10 criminal proceedings failed to provide him with adequate legal representation. However, a  
 11 person "acts under color of state law [for purposes of § 1983] only when exercising power  
 12 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with  
 13 the authority of state law.'" *Polk County v. Dodson*, 454 U.S. 312, 317-18 (1981) (quoting  
 14 *United States v. Classic*, 313 U.S. 299, 326 (1941)). Attorneys appointed to represent defendants  
 15 during trial and pretrial proceedings, do not generally act under color of state law because  
 16 representing a client "is essentially a private function ... for which state office and authority are  
 17 not needed." *Polk County*, 454 U.S. at 319; *United States v. De Gross*, 960 F.2d 1433, 1442  
 18 n.12 (9th Cir. 1992). Thus, when counsel are performing as advocates, *i.e.*, meeting with clients,  
 19 investigating possible defenses, presenting evidence at trial and arguing to the jury, they do not  
 20 act under color of state law for section 1983 purposes. *See Georgia v. McCollum*, 505 U.S. 42,  
 21 53 (1992); *Polk County*, 454 U.S. at 320-25; *Miranda v. Clark County*, 319 F.3d 465, 468 (9th  
 22 Cir. 2003) (en banc) (finding that public defender was not a state actor subject to suit under §  
 23 1983 because, so long as he performs a traditional role of an attorney for a client, "his function,"  
 24 no matter how ineffective, is "to represent his client, not the interests of the state or county.").

25         For all these reasons, the Court finds that Plaintiff's Complaint must be dismissed sua  
 26 sponte for failing to state a claim upon which relief can be granted and for seeking monetary  
 27 damages against immune defendants pursuant to 28 U.S.C. § 1915(e)(2)(B).

28         ///

### **III. CONCLUSION AND ORDER**

**Good cause appearing, IT IS HEREBY ORDERED:**

1. Plaintiff's Motion to proceed IFP pursuant to 28 U.S.C. § 1915(a) (ECF No. 2) is  
**GRANTED.**

**IT IS FURTHER ORDERED** that:

2. Plaintiff's Complaint is **DISMISSED** without prejudice for failing to state a claim upon which relief may be granted and for seeking monetary damages against an immune defendant. *See* 28 U.S.C. § 1915(e)(2).

9       3. Plaintiff is **GRANTED** forty-five (45) days leave from the date this Order is filed  
10 in which to file a First Amended Complaint which cures all the deficiencies of pleading noted  
11 above. Plaintiff's Amended Complaint must be complete in itself without reference to his  
12 original Complaint. *See S.D. CAL. CIVLR 15.1.* Defendants not named and all claims not re-  
13 alleged in the Amended Complaint will be considered waived. *See King v. Atiyeh*, 814 F.2d 565,  
14 567 (9th Cir. 1987). If Plaintiff fails to file an Amended Complaint within 45 days, this matter  
15 will remain dismissed.

16       4. The Clerk of Court is directed to mail Plaintiff a copy of a Court approved § 1983  
17 civil rights complaint.

## IT IS SO ORDERED.

DATED: May 13, 2013

Gonzalo Curiel  
HON. GONZALO P. CURIEL  
United States District Judge